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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	
IMPLEMENTATION OF SECTION 402(b)(1)(A) OF THE TELECOMMUNICATIONS ACT OF 1996	CC Docket No. 96-187

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 450 resale carriers and their underlying product and service suppliers, generally supports the manner in which the Commission has proposed in the Notice of Proposed Rulemaking ("Notice") to implement the streamlined local exchange carrier ("LEC") tariffing requirements embodied in Section 204(a) of the Communications Act of 1934, as amended by Section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996. It is of critical importance to TRA and its resale carrier members that the streamlined LEC tariffing rules adopted in this proceeding contain adequate consumer and competitive safeguards. The manner in which the Commission has proposed to implement the mandate of Section 402(b)(1)(A)(iii) generally achieves this aim. TRA, however, recommends several modifications which it submits appropriately balance competitive and consumer interests and are consistent with the "pro-competitive, de-regulatory national policy framework" created by the Congress in the 1996 Act.

- TRA endorses the Notice's "alternate" reading of the Section 402(b)(1)(A)(iii) mandate that any "new or revised charge, classification, regulation, or practice" filed by an LEC "on a streamlined basis" shall be "deemed lawful." Indeed, TRA submits that this alternate interpretation is the only supportable reading of this requirement. Congress intended Section 402(b)(1)(A)(iii) to speed the effectiveness of LEC tariff revisions, lowering the hurdles an LEC must overcome to implement proposed changes in its rates and terms and conditions of service both by reducing notice periods and by shifting to some degree the burden of proof onto those who oppose LEC tariff revisions. Section 402(b)(1)(A)(iii) was not intended to deny rights long held by consumers to obtain redress for unjust or unreasonable LEC actions, allowing LECs to charge -- and derive full benefit from charging -- unjust and unreasonable rates for some, potentially extended, period of time.

- TRA disagrees with the Notice's view that Section 402(b)(1)(A)(iii) deprives the Commission of the ability to defer LEC tariffs under Section 203(b)(2). "The 1996 Act leaves in place the statutory scheme governing interstate common carrier tariff filings" and Congress certainly did not intend to relax tariffing rules for

ILECs possessed of immense market power to a greater extent than for small IXCs operating in the competitive interexchange market. Hence, the Commission retains with respect to all tariff revisions, including LEC-filed tariff revisions, its full Section 203(b)(2) deferral authority.

- TRA agrees with the Notice that Section 402(b)(1)(A)(iii) "applies to new or revised charges associated with existing services, but not to charges associated with new services." The Notice is correct in its assessment that this reading of Section 402(b)(1)(A)(iii) is "preferable . . . as a matter of policy because it would permit the Commission and interested parties a fuller opportunity to review tariff changes that are more likely to raise sensitive pricing issues than revisions to services that have already been subject to review." Moreover, this interpretation is consistent with current Commission practice and represents a plausible reading of Section 402(b)(1)(A)(iii).

- TRA agrees with the Notice that Section 402(b)(1)(A)(iii) permits LECs to file tariff revisions on longer notice periods than those set forth in that provision and supports the Notice's view that by doing so, the filing LEC waives its right to streamlined processing of such tariff revisions.

- TRA agrees with the Notice that Section 402(b)(1)(A)(iii) does not restrict the Commission's forbearance authority. TRA, however, urges the Commission to exercise its forbearance authority with respect to LEC tariffing requirements judiciously and with great caution given the very substantial market power that ILECs currently possess and will likely retain for the foreseeable future.

- TRA supports the electronic filing of tariffs proposed by the Notice and applauds the Commission for aggressively seeking means of reducing the administrative burden tariff filing imposes on carriers while at the same time enhancing public access to tariff materials and the ability of the Commission to analyze tariff content. TRA supports the Notice's view that a carrier administered electronic tariff filing system would "lead to more streamlined administration of tariffs and wholeheartedly endorses the Notice's proposals that the electronic tariff filing system should "provide 'user friendly' guides and indexes so that the public could access each carrier's tariffs easily" and should "permit parties to file petitions, and responsive pleadings, electronically."

- TRA urges the Commission not to rely exclusively on post-effective tariff review, but to incorporate such post-effective review into its procedures to address unjust and unreasonable tariff revisions which nonetheless become effective despite pre-effective review. TRA submits that pre-effective tariff review is always preferable to any form of post-effective review because it produces by far the most timely relief and avoids unnecessary infliction of harm on consumers, competitors and consumer/competitors.

- TRA supports the various approaches outlined in the Notice to render manageable the exceedingly tight comment cycles required by Section 402(b)(1)(A)(iii), including requirements that filing LECs include with tariff filings detailed descriptions, impact analyses and legal justifications, the establishment of certain presumptions of unlawfulness (which should include tariff provisions which restrict or have the effect of restricting resale), and provisions for the immediate notice of LEC tariff filings to interested parties.

- TRA strongly urges the Commission in establishing procedures for expedited review of LEC tariffs to always provide opportunities for public participation.

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COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Comments in response to the Notice of Proposed Rulemaking, FCC 96-367, released by the Commission in the captioned docket on September 6, 1996 (the "Notice"). In this proceeding, the Commission will promulgate regulations implementing the streamlined local exchange carrier ("LEC") tariffing requirements embodied in Section 204(a) of the Communications Act of 1934 ("1934 Act"),[1] as amended by Section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996 ("1996 Act").[2] The Commission also will consider additional steps outlined in the Notice for streamlining the tariffing process, including the "establish[ment of] a program for the electronic filing of tariffs that will permit carriers to file, and the public to access, tariffs by means of dial-up 'on-line' access."[3]

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[1] 47 U.S.C. § 204(a).

[2] Pub. L. No. 104-104, 110 Stat. 56, § 402(b)(1)(A)(iii) (1996).

[3] Notice, FCC 96-367 at ¶ 1.

I.

INTRODUCTION

TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect the interests of entities engaged in the resale of telecommunications services. TRA's more than 450 members are all actively engaged in the resale of interexchange, international, wireless and/or other telecommunications services and/or in the provision of products and services associated with such resale. As interexchange carriers ("IXCs"), TRA's resale carrier members are reliant upon LECs for originating and terminating exchange access, and as wireless service providers, TRA's resale carrier members are reliant upon LECs for network interconnection. TRA's resale carrier members will also be among the many new market entrants that will soon be offering local exchange telecommunications services, generally through traditional "total service" resale of incumbent LEC ("ILEC") or competitive LEC ("CLEC") retail service offerings or by recombining unbundled network elements obtained from ILECs to create "virtual networks." As CLECs, many of TRA's resale carrier members will be subject to whatever streamlined tariffing rules the Commission adopts here.

TRA's interest in this proceeding is in protecting the interests of its resale carrier members both as customers and competitors of ILECs and CLECs. To this end, it is of critical importance to TRA and its resale carrier members that the streamlined LEC tariffing rules adopted in this proceeding contain adequate consumer and competitive safeguards. The manner in which the Commission has proposed in the Notice to implement the mandate of Section

402(b)(1)(A)(iii) generally achieves this aim. TRA, however, recommends below several modifications which it submits appropriately balance competitive and consumer interests and are consistent with the "pro-competitive, de-regulatory national policy framework" created by the Congress in the 1996 Act.[4]

II

ARGUMENT

A. Streamlined LEC Tariff Filings Under Section 402 of the 1996 Act (¶¶ 5 - 15)

TRA endorses the Notice's "alternate" reading of the Section 402(b)(1)(A)(iii) mandate that any "new or revised charge, classification, regulation, or practice" filed by an LEC "on a streamlined basis" shall be "deemed lawful." Indeed, TRA submits that this alternate interpretation is the only supportable reading of this requirement. As described in the Notice, the alternate reading of "deemed lawful" would "establish higher burdens for suspensions and investigation," but would not "change the status of tariffs that become effective without suspension and investigation."[5]

TRA submits that Section 402(b)(1)(A)(iii) was intended to speed the effectiveness of LEC tariff revisions, lowering the hurdles an LEC must overcome to implement proposed changes in its rates and terms and conditions of service both by reducing notice periods and by shifting to some degree the burden of proof onto those who oppose LEC tariff revisions.

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[4] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess., p. 113 (1996) ("Joint Explanatory Statement").

[5] Notice, FCC 96-367 at ¶ 12.

Properly implemented, this is a potentially pro-competitive, pro-consumer action. Section 402(b)(1)(A)(iii) was not intended to entirely restructure the legal framework currently applicable to rates and terms and conditions of service ultimately found by the Commission to be unjust and unreasonable, providing ILECs possessed of massive market power with protections not afforded to even small nondominant carriers in the interexchange market. And Section 402(b)(1)(A)(iii) certainly was not intended to deny rights long held by consumers to obtain redress for unjust or unreasonable LEC actions. Such an approach would be anti-competitive and anti-consumer.

"Deemed lawful" simply cannot be equated with "is lawful" without producing absurd results. Given the large number of tariffs with which the Commission must deal and the extremely short review periods allowed by the 1996 Act for Commission assessment of the lawfulness of LEC tariff revisions, the chances that all unjust and unreasonable rates and terms and conditions of service proposed by LECs will be detected prior to becoming effective are slim. Why should a consumer, a competitor or a consumer/competitor be denied relief from unjust and unreasonable LEC rates or unjust or unreasonable terms or conditions of service simply because Commission resources are stretched too thin or because an LEC manages to avoid detection by one stratagem or another? Certainly Congress did not intent to grant LECs -- particularly ILECs possessed of substantial market power -- such a license to levy unjust or unreasonable rates or to subject consumers to unjust or unreasonable terms and conditions of service.

As the Notice correctly recognizes, there is an order of magnitude difference between a finding of lawfulness made by the Commission following a formal investigation of proposed tariff revisions and the cursory review that will be possible under the Section 402(b)(1)(A)(iii) notice periods. As described by the Notice, "[u]nlike findings in tariff

investigations, which are based on the record gathered during the course of the investigation, a decision not to suspend a streamlined LEC tariff filing will be based on a much abbreviated record and there will be no written decision."[6] And even though the decision not to suspend would not be completely equivalent to a finding of lawfulness based on a complete record in all respects under the Notice's initial interpretation of "deemed lawful," it would be so when applied to remedies available to consumers.

As properly acknowledged by the Notice, "[a]ny interpretation of 'deemed lawful,' of course, must be consistent with other provisions of the Communications Act."[7] And as recognized by the Notice, "the 1996 Act leaves in place the statutory scheme governing interstate common carrier tariff filings, but permits LECs to file tariffs on a streamlined basis."[8] TRA agrees with the Notice, that the Notice's alternate reading of "deemed lawful" satisfies this standard, but disputes the Notice's conclusion that its initial interpretation of this phrase also does so. As noted above, it is TRA's view that the initial interpretation restructures in critical respects the relationship between LECs and consumers, allowing LECs to charge -- and derive full benefit from charging -- unjust and unreasonable rates for some, potentially extended, period of time. Such a result is inconsistent with the mandate of Section 201(b) that "[a]ll charges, practices, classifications, and regulations for and in connection with . . . [interstate or foreign communication by wire or radio] shall be just and reasonable . . ."[9]

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[6] Id. at ¶ 11.

[7] Id. at ¶ 13.

[8] Id.

[9] 47 U.S.C. § 201(b).

As to the relative impact on small business of the two alternative readings of "deemed lawful" proposed in the Notice, TRA submits that each would benefit a different segment of the small business community; small LECs would obviously benefit from charging rates which are unjustly or unreasonably high without ever having to reimburse customers, while small business consumers and consumer/competitors would be better served by preservation of the opportunity to recoup amounts charged in excess of just and reasonable rate levels. Quantitatively, the latter group is substantially larger, but this is not the proper grounds for resolving the matter. The issue is far more fundamental; LECs simply should not be permitted to charge and retain unjust and unreasonable rates and should not be insulated from damages resulting from the imposition of unjust and unreasonable terms and conditions of service.

Finally, TRA disagrees with the Notice's view that Section 402(b)(1)(A)(iii) deprives the Commission of the ability to defer LEC tariffs under Section 203(b)(2).[10] As noted above, the Notice is correct in its assessment that "the 1996 Act leaves in place the statutory scheme governing interstate common carrier tariff filings . . . "[11] Moreover, as TRA argued above, Congress certainly did not intend to relax tariffing rules for ILECs possessed of immense market power to a greater extent than for small IXCs operating in the competitive interexchange market. Rather, Congress intended only to "permit[] LECs to file tariffs on a streamlined basis."[12] Hence, the Commission retains with respect to all tariff revisions, including LEC-filed tariff revisions, its full Section 203(b)(2) deferral authority.

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[10] 47 U.S.C. § 203(b)(2).

[11] Notice, FCC 96-367 at ¶ 13.

[12] Id.

B. LEC Tariffs Eligible for Filing on a Streamlined Basis (¶¶ 16 - 19)

The Notice raises four issues with respect to the types of LEC tariff filings that are eligible for streamlined treatment under Section 402(b)(1)(A)(iii). First, the Notice questions whether "only tariff revisions which involve rate increases or decreases are eligible for streamlined filing."[13] Second, the Notice queries whether Section 402(b)(1)(A)(iii) should be read to "apply only to 'new or revised' charges, classifications, or practices associated with existing services."[14] Finally, the Notice tentatively concludes that "LECs may elect to file on longer notice periods, but that if they do so, such tariffs would not be 'deemed lawful,'" and that Section 402(b)(1)(A)(iii) "does not preclude the Commission from exercising its forbearance authority under Section 10(a) of the Act to establish permissive or mandatory detariffing of LEC tariffs, should the Commission choose to do so."[15] TRA endorses the Commission's views as to each of these four matters.

TRA agrees with the Notice that Section 402(b)(1)(A)(iii) "applies to new or revised charges associated with existing services, but not to charges associated with new services."[16] The Notice is correct in its assessment that this reading of Section 402(b)(1)(A)(iii) is "preferable . . . as a matter of policy because it would permit the Commission and interested parties a fuller opportunity to review tariff changes that are more likely to raise sensitive pricing

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[13] Id. at ¶ 17.

[14] Id. at ¶ 18.

[15] Id. at ¶ 19.

[16] Id. at ¶ 18.

issues than revisions to services that have already been subject to review."[17] Moreover, this approach is consistent with current Commission differentiation between charges for new services and revised charges for existing services.[18]

The Notice's approach represents a plausible reading of Section 402(b)(1)(A)(iii). Section 402(b)(1)(A)(iii) applies to "new or revised charge[s], classification[s], regulation[s], or practice[s]," not to new or revised services. Hence, limiting streamlined processing to tariff revisions associated with existing services is fully consistent with Section 402(b)(1)(A)(iii). Moreover, the Notice's reading raises no administrative impediments that are not easily overcome. The determination of whether or not specific LEC tariff filings are eligible for streamlined filing could be predicated in the initial instance on an officer's certification that the tariff revisions do not introduce new services.

While it is a somewhat expansive reading of Section 402(b)(1)(A)(iii), TRA does not object to the Notice's view that the provision could be read to apply streamlined processing to LEC tariff revisions which do not raise or lower rates. TRA also agrees with the Notice that the inclusion of the word "may" in Section 402(b)(1)(A)(iii) permits LECs to file tariff revision on longer notice periods and supports the Notice's view that by doing so, the filing LEC waives its right to streamlined processing of such tariff revisions. Finally, TRA agrees with the Notice that Section 402(b)(1)(A)(iii) does not restrict the Commission's forbearance authority. TRA,

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[17] Id.

[18] *See, e.g.,* Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd. 6786, 6824-25 (1990), *recon.* 6 FCC Rcd. 2637 (1991), *aff'd sub nom.* National Rural Telecommunications Assoc. v. FCC, 988 F.2d 174 (D.C.Cir. 1993).

however, urges the Commission to exercise its forbearance authority with respect to LEC tariffing requirements judiciously and with great caution given the very substantial market power that ILECs currently possess and will likely retain for the foreseeable future. In TRA's view, further relaxation of LEC tariffing requirements for at least ILECs possessed of huge market shares could not be justified under Section 10(a) as unnecessary to ensure just, reasonable and nondiscriminatory rates or practices, to protect consumers or to serve the public interest. Certainly, at this nascent stage of local exchange competition, forbearance would not promote competitive market conditions; indeed, it would hinder the development of competition.

C. Streamlined Administration of LEC Tariffs (¶¶ 20- 34)

As noted previously, the Notice, in addition to promulgating rules implementing Section 402(b)(1)(A)(iii) of the 1996 Act, also proposes several "steps for streamlining the tariff process that are designed to advance the broader goals of the 1996 Act."[19] Chief among these measures is the electronic filing of tariffs. TRA applauds the Commission for aggressively seeking means of reducing the administrative burden tariff filing imposes on carriers while at the same time enhancing public access to tariff materials and the ability of the Commission to analyze tariff content. TRA agrees with the Notice that any electronic tariff filing arrangement should be "speedy, reliable and cost-effective," but more importantly, it should provide for easy and complete public access to tariffs, tariff transmittal letters and tariff support.

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[19] Notice, FCC 96-367 at ¶ 1

To this end, TRA agrees with the Notice that each carrier should bear the responsibility for posting, managing, and maintaining its own electronic file of tariffs, subject not only to Commission specifications and requirements, but to direct Commission oversight. TRA supports the Notice's view that a carrier administered electronic tariff filing system in which individual carriers are responsible for ensuring the completeness and accuracy of their electronic tariff publications and are the only entities (other than the Commission) able to access their assigned space on the electronic filing system, would "lead to more streamlined administration of tariffs."[20] TRA wholeheartedly endorses the Notice's proposals that the electronic tariff filing system should "provide 'user friendly' guides and indexes so that the public could access each carrier's tariffs easily" and should "permit parties to file petitions, and responsive pleadings, electronically."[21]

With respect to the Notice's proposals for Commission review of LEC tariffs, TRA urges the Commission not to rely exclusively on post-effective review, but to incorporate post-effective tariff review into its procedures to address unjust and unreasonable tariff revisions which nonetheless become effective despite pre-effective review. TRA submits that pre-effective tariff review is always preferable to any form of post-effective review because it produces by far the most timely relief and avoids the unnecessary infliction of harm on consumers, competitors and consumer/competitors. An unjust and unreasonable rate or term or condition of service which never takes effect cannot do any harm. An unjust and unreasonable rate or term or

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[20] Id. at ¶ 22.

[21] Id.

condition of service which is allowed to take effect will not only inflict harm, but may well result in injury which is irreparable given the lag time in determining that the rate or term or condition of service is unlawful. Certainly then, the Commission should not "establish a practice of relying on post-effective review."[22] It should, however, retain the discretion to conduct post-effective tariff reviews in individual cases when necessary to protect consumer/competitor interests.

TRA agrees with the Notice that the timeframes established by Section 402(b)(1)(A)(iii) for pre-effective tariff review require exceedingly tight comment deadlines. TRA further agrees with the Notice that these close deadlines demand measures which will make the seemingly impossible task of opposing LEC tariff revisions at least arguably doable. Thus, TRA supports the Notice's proposal that LECs should be required to provide detailed descriptive summaries of all tariff revisions which highlight not only the nature, but also the impact, of the changes. TRA also endorses the Notice's recommendation that all tariff revisions be accompanied by a legal analysis demonstrating that the proposed changes are indeed lawful. As noted above, TRA would also require an officer's certification that the tariff revisions qualify for streamlined processing. Finally, TRA strongly supports the Notice's suggestion that certain presumptions of unlawfulness should be established. As suggested by the Notice, tariffs facially not in compliance with the Commission's price cap rules would be prime candidates for a presumption of unlawfulness. TRA would add to the list of presumptively unlawful tariff revisions those tariff provisions which restrict resale or have the effect of restricting resale.

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[22] Id. at ¶ 23.

As to the mechanics of pre-effective tariff review within the constraints established by Section 402(b)(1)(A)(iii), TRA agrees with the Notice that tariff filings should clearly announce whether they are subject to streamlined processing and whether they provide for rate increases, rate decreases or both. Tariff revisions which provide for both rate increases and decreases should, TRA agrees with the Notice, be subject to the 15-day, rather than the 7-day, notice period. TRA wholeheartedly supports the Notice's proposal that interested party lists be maintained and that entities so listed be informally notified by electronic mail each time an LEC tariff is filed. Such a notice mechanism, TRA submits, should not await electronic tariff filing, but should be implemented immediately. Given such a notice mechanism, the absurdly short, but admittedly unavoidable, petition dates suggested in the Notice would become at least somewhat manageable. TRA would suggest, however, that in order to accommodate small carriers with limited budgets, facsimile transmission should be added to the hand delivery requirement recommended by the Notice in an effort to make comment and reply dates more realistic.

Implicit in TRA's comments is a strongly-held belief that opportunity for public comment should always be made available. Public comment will assist the Commission in its exceedingly pressed consideration of the lawfulness of LEC tariff revisions. Moreover, denial of the right to comment on LEC tariff revisions would violate fundamental notions of fairness and conflict with long-established Commission precedent. Finally, TRA submits that carrier claims of confidentiality should not be permitted to interfere with the right of the public to comment on LEC tariff revisions. TRA, accordingly, suggests that LECs which seek confidential treatment of tariff support material should be required to forego streamlined processing of the

treatment of tariff support material should be required to forego streamlined processing of the associated tariff revisions.

TRA supports the Notice's proposal to require price cap LECs to file tariff review plans ("TRPs") prior to the filing of their annual access tariffs. As the Notice points out, "[u]nder this approach, the Commission and the public could examine the carrier's current and proposed price cap indices, exogenous cost adjustments, and supporting information in advance of the LECs' submissions of their prospective rates and required supporting data."[23] TRA agrees with the Commission that the TRP is not subject to Section 402(b)(1)(A)(iii) because it does not include information regarding rates or terms or conditions of service. Certainly, it is within the discretion of the Commission to require the submission of data from regulated providers and Section 402(b)(1)(A)(iii) in no way diminishes the Commission's authority in this respect.

TRA agrees with the Notice that expeditious conduct of tariff investigations is required under Section 402(b)(1)(A)(i). This need for expedition, however, may be best met by providing the Common Carrier Bureau with the discretion to structure each investigation in a manner which best accommodates the unique characteristics of the tariff revisions in dispute and the participating parties. Certainly matters such as tight pleading cycles, strict page limits and proposed orders would all be useful tools in this regard. TRA cautions, however, against over abbreviation of orders. Excessively abbreviated orders will not provide guidance to LECs filing subsequent tariff revisions or parties adversely effected by those modifications and considering the filing of oppositions thereto. Pro forma orders provide precious little, if any, clarification of

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[23] Id. at ¶ 31.

option in selected instances, but should be employed judiciously because the impact of any given tariff filing will reach far beyond the particular litigants fighting over its lawfulness.

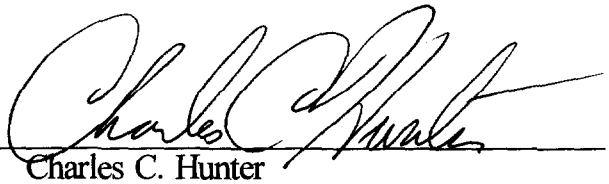
III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to adopt rules and policies in this docket consistent with these comments.

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS ASSOCIATION

By: 

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